PUBLIC COPY

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, Rm 3042
425 I Street, NW
Washington, DC 20536

[redacted]

File: [redacted] Office: TEXAS SERVICE CENTER Date: MAR 22 2004

SRC 00 059 52185

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

[redacted]

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The Administrative Appeals Office (AAO) dismissed the appeal (AAO1) and a subsequent motion to reopen (AAO2). The petitioner now brings the matter before the AAO on a second motion to reopen (P3). The motion will be granted, the previous decisions of the director and the AAO will be affirmed, and the petition will be denied.

Following the petitioner's motion to reopen, received July 20, 2001 (P2), counsel supplemented it with an addendum, dated August 6, 2001 (P2 addendum). The whole contained reasoning that invoices represented increased business attributable to the beneficiary and, therefore, proved the petitioner's ability to pay the proffered wage. Since the record may not have contained the P2 addendum at the time of the decision in AAO2, the present motion to reopen appropriately provides for a review of the P2 addendum as new evidence. 8 C.F.R. § 103.5(b)(2). If the lack of data caused an error of law, the motion to reconsider will correct it. 8 C.F.R. § 103.5(b)(3).

The AAO will review the record both as to the petitioner's ability to pay the proffered wage and as to qualifications that the petitioner set forth for the beneficiary. After stating the case, applicable law, and regulations, the discussion will resume with the consideration of the petitioner's ability to pay the proffered wage.

The petitioner is a firm engaged in the restoration of classic British sports cars. It seeks to employ the beneficiary permanently in the United States as a shop foreman. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor. The Form ETA 750 certified the job title of shop mechanic.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

Provisions of 8 C.F.R. § 204.5(g)(2) state:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant

> which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter turns, in part, on the petitioner's ability to pay the wage offered as of the petition's priority date. The priority date is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. The petition's priority date in this instance is December 24, 1998. The beneficiary's salary as stated on the labor certification is $14 per hour or $29,120 per year.

The petitioner initially submitted insufficient evidence of the ability to pay the proffered wage. In a request for evidence (RFE), dated March 22, 2000, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing to the present.

In response, the petitioner submitted its 1998 and 1999 Forms 1120S, U.S. Income Tax Return for an S Corporation. The 1998 Form 1120S showed total income of $38,289, cost of labor of $74,867, and, ultimately, an ordinary loss of ($24,401) from trade or business activities. The 1998 Schedule L reported current assets of $30,275 minus current liabilities of $7,031, or net current assets of $23,244, less than the proffered wage.

The 1999 Form 1120S revealed total income of $45,108, cost of labor of $46,909, and an ordinary loss of ($21,590) from trade or business activities. The 1999 Schedule L stated current assets of $31,006 minus current liabilities of $7,031, or net current assets of $23,975, less than the proffered wage. The response to the director's request for evidence included unaudited financial statements as proof of the ability to pay the proffered wage, but the director excluded their consideration. They are of little evidentiary value because they are based solely on the representations of management. 8 C.F.R. § 204.5(g)(2), *supra*.

The director observed that the petitioner's payroll records, also submitted in response to the RFE, did not reveal any wages paid to the beneficiary in 1998 and 1999. The director concluded that the evidence did not clearly establish that the petitioner had

the ability to pay the proffered wage, and denied the petition on July 12, 2000.

The petitioner's President appealed on August 4, 2000 (P1). She stated that the accelerated expansion of the business required the beneficiary's services.

The AAO determined that the basis for this conclusion was unclear. For example, the petitioner did not demonstrate that the beneficiary will replace less productive workers, transform the nature of the petitioner's operation, or increase the number of customers on the strength of his reputation. The AAO concluded that Citizenship and Immigration Services (CIS), formerly the Service or the INS, could not take into account potential earnings generated by the beneficiary's employment. The AAO dismissed the appeal on June 12, 2001 (AAO1).

Counsel filed a motion to reopen (P2), dated July 13, 2001, a brief with 18 points, and exhibits A-H. The petitioner and counsel conceded that they were awaiting more evidence of the petitioner's ability to pay the proffered wage. In a second decision dated April 4, 2002 (AAO2), the AAO concluded that the petitioner had not established the ability to pay the proffered wage at the priority date and that the petition could not be approved.

Counsel counters with another motion to reconsider and, in the alternative, motion to reopen, received May 2, 2002 (P3). Counsel relies, in part, on payroll records for 1998, in exhibit 7, to show payment of salaries. However, none was paid to the beneficiary until 2000. Though payments in 2000 establish the petitioner's ability to pay the proffered wage to the beneficiary in 2000, the petitioner must also establish the ability to pay in 1998 and 1999. It is noted that salaries, once paid to others, are not readily available to pay the beneficiary. Thus, the petitioner cannot establish its ability to pay the proffered wage by salaries disbursed to other employees in 1998 and 1999.

After, the priority date, only $558.47 of the proffered wage applied to the 7 of 365 days remaining in 1998. Net current assets amounted to $23,244, equal to or greater than the prorated wage. Thus, the petitioner established its ability to pay the proffered wage in 1998 at the priority date.

Nonetheless, the net income and net current assets did not establish the ability to pay the proffered wage in 1999. The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate that financial

ability, continuing until the beneficiary obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989). The regulations require proof of eligibility at the priority date. 8 C.F.R. § 204.5(g)(2). 8 C.F.R. § 103.2(b)(1) and (12).

Exhibit 8 offers to prove that an investor (OL) will put personal money in the petitioning corporation's business, as needed. Contrary to counsel's primary assertion, CIS cannot "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

In exhibit 9, the petitioner's President acknowledged a statement on May 3, 2002, after counsel had filed P3. She states that 1998 "work in process inventory" was realized in 2000 and attaches various invoices of 2000. This representation does not credibly state the duration of any work in process, does not apportion it to 1998, 1999, or 2000, or any one of them, and does not justify the petitioner's ability to pay the proffered wage in all, or any, of them. The extract of financial records in exhibit 9 only amounts to an unaudited financial statement.

Exhibit 6 (P3 Addendum) transmits invoices for 2000, said to represent $64,929.38 of revenue from the beneficiary's H1B employment with the petitioner. No audited financial statement supports this interpretation.

The 1999 federal tax return reflected amounts less than the proffered wage. Other responses to the director's request for evidence included unaudited financial statements as proof of the ability to pay the proffered wage. They are of little evidentiary value because they are based solely on the representations of management. *See* 8 C.F.R. § 204.5(g)(2).

Counsel asserts that consideration of the beneficiary's potential to increase the petitioner's revenues is appropriate and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. The evidence for the potential is spurious. Some of the entries

refer, instead, to bad checks, handwritten invoices, which are not in the record, and even expenses of doing business. *See* P3 exhibit 6 with appendix A. Moreover, the selected invoices and gross revenues do not, as claimed, relate to the priority date or to 1999, the year for which evidence fails to support the ability to pay the proffered wage.

Matter of Ho, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

> Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.
>
> It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

The petitioner's President, nevertheless, perseveres in P3 exhibit 9, with claims of gross revenues and revenues yet to be earned:

> 13. It is typical with development stage companies, such as ours was during that time period, that qualified, revenue-generating workers are hired to work on already-increased customer bases that do not show up on balance sheets, profit and loss statements and tax returns.
>
> 14. . . . .
>
> 15. The off-the-books work in process must be considered in determining [the petitioner's] ability to pay [the beneficiary] at the [priority date].

Counsel gives no authority for this use of unaudited financial statements and future earnings. In determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd.*,

[redacted]

703 F.2d 571 (7th Cir. 1983).

In *K.C.P. Food Co., Inc. v. Sava*, the court held that CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F.Supp. at 1084. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. at 1054.

Although counsel asserts that payroll records prove the ability to pay the beneficiary the proffered wage, none records a payment to the beneficiary for 1999. Amounts applied to the wages of others are not available to pay the beneficiary's. The petitioner did not put the beneficiary on the payroll until January 2000.

Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

After a review of the federal tax returns, the appeal, and motions and exhibits attached to them, it is concluded that the petitioner has not established that it had sufficient available funds in 1999 to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

The second issue in this case focuses on qualifications of the beneficiary. The AAO examined the lack of specifics in the proof of training and experience of the beneficiary, as exacted by the Form ETA 750, and concluded, in a second decision dated April 4, 2002 (AAO2) at 2-3:

> On motion, counsel resubmits the beneficiary's certificates of training and achievement and two additional letters of appreciation from clients who testify that he repaired their cars. As noted by [CIS], however, the certificates did not state the length of each course nor did they indicate the session the course was taken in. The letters also do not indicate how long the beneficiary had been a mechanic, but merely states that they had confidence in the beneficiary's ability. The record does not contain evidence that the beneficiary gained the requisite experience as of the [priority date]. Therefore, the petitioner has not overcome this portion of the director's decision.

Counsel counters with another motion to reconsider and, in the alternative, motion to reopen, received May 2, 2002 (P3). It includes exhibits 1-9, asserts that the director received them on August 7, 2001, and complains that they were not considered in AAO2. Exhibits 4-5 are letters of recommendation from former employers abroad, said to relate to the beneficiary's experience. Exhibit 7 houses voluminous payroll records, said to prove the petitioner's ability to pay the proffered wage, as discussed above. Exhibits 8 and 9 offer a business plan, said to compel the beneficiary's employment.

Counsel states:

> We respectfully request that you take another, fresh look at [P2]. The section entitled Previously Unsubmitted Evidence of Beneficiary's Qualifications should compel a finding that the beneficiary is more than likely one of ***the*** most qualified people in the world for this position.

The RFE exacted evidence both of four (4) years of training and of four (4) years of experience in the job offered or a related position. Form ETA 750 mandated proof of each of them.

Inexplicably, the petitioner and counsel persisted in the omission of proof of four (4) years of experience, before the priority date, in the job offered or a related position. *See* 8 C.F.R. § 204.5(g)(1). Counsel claimed 40 years of experience for the beneficiary.

Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Counsel now offers with P3, two (2) experience letters, but they do not verify the beneficiary's qualifying, full time employment before the priority date. 20 C.F.R § 656.3 *Employment*. Moreover, they are untimely.

The regulation at 8 C.F.R. § 103.2(b) states:

> *Evidence and processing* - (1) *General.* An applicant or petitioner must establish eligibility for a requested immigration benefit. An application or petition form must be completed as applicable and filed with any initial evidence required by regulation or by the instruction on the form. Any evidence submitted is

considered part of the relating application or petition.

When additional evidence is requested, 8 C.F.R. § 103.2(b)(8) prescribes:

> In such cases, the applicant or petitioner shall be given 12 weeks to respond to a request for evidence. Additional time may not be granted. Within this period the applicant or petitioner may:
>
> (i) Submit all the requested initial or additional evidence;
>
> (ii) Submit some or none of the requested additional evidence; or
>
> (iii) Withdraw the application or petition.

The director's RFE specifically exacted the letters to demonstrate four (4) years of experience. The petitioner did not provide them within the time to respond, and the omission persisted. Where the petitioner is notified and has a reasonable opportunity to address the deficiency of proof, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before CIS. *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

Provisions of 8 C.F.R. § 103.2(b) apply to this motion to reopen:

> (13) *Effect of failure to respond to a request for evidence or appearance.* If all requested initial evidence and requested additional evidence is not submitted by the required date, the application or petition shall be considered abandoned and, accordingly, shall be denied.

The outcome turns, in part, on whether the beneficiary met all of the requirements stated by the petitioner in block 14 of Form ETA 750 as of the day it was filed with the Department of Labor. The evidence did not establish four (4) years of experience. Therefore, the petitioner has not overcome this portion of the director's decision.

Turning last to training, counsel considers that:

> [AAO2] is incorrect because the evidence provided in the original labor certification application, [P2], and

[redacted]

> the Addendum to [P2] . . . when taken as a whole clearly establish[es] that the beneficiary did, in fact, meet the qualifications for the position as stated in [Form ETA 750].

The petitioner's response to the RFE included four (4) certificates of training for 1959, 1960, 1961, and 1963. They stated that the beneficiary passed, respectively, two (2) annual examinations and, in 1961 and 1963, theoretical and practical examinations in motor vehicle mechanics work. The director's decision objected, however, that these certificates did not state dates of attendance and verify compliance with Form ETA 750. With P2, counsel provided an interpretation from the City and Guilds of London. The effect of the evidence of training is moot, however, and will not be discussed further.

This case turns, instead, on the conclusions in respect to the petitioner's ability to pay the proffered wage at the priority date and continuing until the beneficiary obtains lawful permanent residence and in respect to the beneficiary's claimed experience.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The motion to reopen is granted, and the previous decisions of the director and the AAO are affirmed. The petition is denied.